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No. 04-1000

Supreme Court, U.S.
FILED
APR 13 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNUM LIFE INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

SHIRLEY O. FOUGHT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY BRIEF

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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PETITIONER'S REPLY BRIEF

I. THE DEPARTMENT OF LABOR REGULATIONS ARE IRRELEVANT TO THE STANDARD OF REVIEW ISSUE.

Ms. Fought concedes that the DOL regulations on which she primarily relies "admittedly [are] not directly on point as to the question presented by Ms. Fought's case." Opposition at 11. That is an understatement. The DOL regulations do not remotely address the standard of review applied by federal courts in reviewing ERISA benefits determinations, and the fact that those regulations have been amended since UNUM decided the benefit claim in this case certainly does not moot the issue presented in the petition.

The DOL regulations set forth the minimum requirements for *internal plan review* of group health and disability claims

under Section 503 of ERISA, 29 U.S.C. § 1133(2) (2000). They require every plan to "establish and maintain reasonable procedures governing . . . claims procedures," which are defined as "the filing of benefit claims, notification of benefit determinations, and appeal of adverse benefit determinations." 29 C.F.R. § 2560.503-1(b) (2004). The "appeal[s] of adverse benefit determinations" that the DOL regulations address are limited to "appeal[s] [from] an adverse benefit determination to an appropriate named fiduciary of the plan," *id.* § 2560.503-1(h)(1), in other words, to what are generally referred to as "administrative appeals."

The issue in this case has nothing to do with a plan's internal review process, but relates solely to the standard of review in *judicial appeal actions* under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B) (2000). In particular, UNUM seeks resolution of the conflicting approaches that the circuits employ to resolve the following questions: (a) Under what circumstances an insurance company's dual role as funding source and ERISA claim fiduciary presents a conflict of interest; and (b) how such a conflict, if established, impacts the arbitrary and capricious judicial review standard in Section 502(a)(1)(B) actions. The DOL regulations do not purport to reach these subjects and they set forth no requirements whatsoever related to the standard of review in judicial review actions filed under Section 502(a)(1)(B).

Ms. Fought relies on the provision that, if a plan fails to follow the claims procedures set forth in the DOL regulations, the "claimant shall be deemed to have exhausted the administrative remedies available under the plan and shall be entitled to pursue any available remedies under section 502(a) of the Act . . ." 29 C.F.R. § 2560.503-1(*l*) (2004), *quoted in* Opposition at 9-10. But that section says nothing about the standard of review applicable in a subsequent judicial review

action; it merely states when such an action is available to a disappointed claimant.[1]

UNUM's internal review of Ms. Fought's claim would not have violated the 2000 amendments to the DOL regulations even if they had been in place when UNUM considered the claim in 1998 and 1999. The DOL regulations provide that "in deciding an appeal of any adverse benefit determination that is based in whole or in part on a medical judgment," the fiduciary must "consult with a health care professional who has appropriate training and experience in the field of medicine involved in the medical judgment." 29 C.F.R. § 2560.503-1(h)(3)(iii) (2004), *incorporated in* 29 C.F.R. § 2560.503-1(h)(4) (2004). In this case, the medical facts were undisputed and the denial of benefits was not "based in whole or in part on a medical judgment," but on the meaning of the policy's pre-existing condition provision. *See* Petition at 7-8 n.1. Thus, the DOL regulations would not have required UNUM to consult with a medical professional. But even if medical consultation had been required, UNUM's medical department reviewed Ms. Fought's claim during the administrative appeal process. *See* App. 4a-5a & n.1.

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[1] When the DOL initially published the proposed rules in 1998, the agency stated its view that, if a plan failed to follow the proposed administrative claim procedures, a benefits denial would not be "entitled to . . . deference" in a subsequent judicial appeal. 62 Fed. Reg. 48390, 48397 (Sept. 9, 1998). However, that thought did not survive the following two years of extensive consideration of and revision to the proposed regulations, and was not carried over into the final rules. Thus, Ms. Fought is wrong in stating that "the new DOL Rule requir[es] . . . *de novo* district court review" if the administrative procedures are not fully satisfied. Opposition at 11; *see also id.* (describing regulations as providing "trial *de novo* remedy . . . when the fiduciary does not strictly comply with the minimum standards for full and fair review"). In any event, as explained in the text, there is no basis for Ms. Fought's premise that UNUM's administrative review in this case would have violated the DOL regulations.

The Tenth Circuit's standard of review analysis did not turn on whether Ms. Fought's claim presented a question of medical judgment, whether UNUM obtained appropriate medical consultation, or whether UNUM otherwise complied with either the old or new DOL regulations.[2] It turned only on UNUM's status as an insurance company that both serves as a claim fiduciary and funds the plan through an insurance policy. The DOL regulations have no bearing on the issue that the Tenth Circuit decided, that the circuits have clashed on, and that this Court should resolve.

II. THERE ARE IRREFUTABLE CONFLICTS AMONG THE CIRCUITS ON THE STANDARD OF REVIEW ISSUE.

The principal bases for granting the petition are (a) the massive conflicts among the circuits on the appropriate standard of review in dual-role cases, and (b) the conflict between the Tenth Circuit's analysis of that issue and this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Petition at 10-20. Incredibly, Ms. Fought does not respond to either of these arguments other than in the most conclusory fashion. *See* Opposition at 5, 17. She does not address the substance of the standard of review analysis in *Firestone*, nor even mention—much less try to reconcile—any of the two-dozen court of appeals decisions or multiple law review articles cited in the petition, which evidence the overwhelming conflicts in the lower courts.

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[2] In dictum, the Tenth Circuit stated that UNUM's failure to obtain an IME was a procedural irregularity evidencing a conflict of interest that would have independently justified shifting the burden to UNUM to defend its denial of benefits. App. 16a, 31a-32a. However, the DOL regulations do not oblige a fiduciary to obtain an IME where an internal medical review, as occurred in this case, satisfies the medical consultation requirement. Furthermore, whether such a conflict should cause the burden of proof to shift to the insurer is an integral part of the issue presented in the petition.

Ms. Fought's silence is telling. She says nothing because there is nothing she can say. The split in the circuits is undeniable and not reconcilable, as most recently confirmed by the First Circuit. In *Wright v. R.R. Donnelley & Sons Co. Group Benefits Plan*, ___ F.3d ___, No. 04-1986, 2005 WL 678952 (1st Cir. Mar. 25, 2005), the court adhered to First Circuit precedent holding that an insurer's "dual status as payor of benefits and administrator with respect to the LTD benefits" "was not alone sufficient to alter the [deferential] standard of review." 2005 WL 678952, at *5. The court observed, however, "that other circuits have rejected the market forces rationale and specifically recognized a conflict of interest when the insurer of an ERISA plan also serves as plan administrator, *although there is no consistent approach in adjusting the standard of review*." *Id.* at *6 n.5 (citing *Fought* and other cases) (emphasis added).

The issue presented in this case—the existence and impact of a "conflict" under *Firestone*—has percolated for over fifteen years in the lower courts. The law below is confused, confusing, and inconsistent. The conflicts in the law are real and pressing and merit resolution by this Court.

III. THIS CASE IS IDEALLY SUITED FOR THE COURT TO RESOLVE THE CONFLICTS AMONG THE CIRCUITS.

Unable to rebut the existence of a conflict in the lower courts, Ms. Fought argues instead that this is not the right case for resolution of the circuit split. Implicitly conceding the division among the circuits on the law, she claims that on the record in this case, UNUM's denial of benefits "would not have passed muster in any circuit, regardless of the variations in their approach to conflicted plan fiduciaries." Opposition at 6. UNUM, obviously, disagrees. The district court (a Tenth Circuit active judge sitting by designation),

which applied the Tenth Circuit's pre-*Fought* sliding scale approach and upheld the benefits denial as neither arbitrary nor capricious, also disagreed. *See* App. 6a-7a.

But Ms. Fought's argument is beside the point. UNUM's petition presents a legal issue: What is the appropriate standard of review of an ERISA fiduciary's denial of benefits when the plan vests the fiduciary with discretion, and the fiduciary is an insurance company that also funds the plan through an insurance policy? The only factual predicates for resolving that issue are (a) whether the plan gives the fiduciary discretion, (b) whether the fiduciary is an insurance company, and (c) whether the insurance company also funds the plan. Those facts are undisputed in this case and those are the only facts that the Tenth Circuit found relevant in its blanket indictment of all dual-status insurers as presumptively conflicted. *See* App. 8a-17a (discussing and determining standard of review without reference to any of the facts argued by Ms. Fought); *id.* at 7a-8a (confirming that court did not consider the facts argued by Ms. Fought until *after* it had adopted a reduced deference standard).

The question is one of law, the parties developed an adequate record on UNUM's motion for summary judgment, and the Tenth Circuit treated the question at length in a detailed opinion. The issue is now ready for determination by this Court.

CONCLUSION

For the reasons set forth in the petition and in this reply brief, the Court should grant the petition to reconcile the intercircuit conflicts on the important issue presented by this case.

Respectfully submitted,

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